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NTSB Order No. EA-4456

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 13th day of May, 1996

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14138
v.	)	
	)	
MICHAEL BARRY,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on September 27, 1995, following an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.129(i), 91.157(b), and

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached.

91.13(a).<sup>2</sup> The law judge reduced the Administrator's 90-day proposed suspension of respondent's private pilot certificate to a suspension of 50 days, a reduction the Administrator does not appeal. We deny respondent's appeal.

The issue before the law judge in this case was whether respondent, as the pilot-in-command of helicopter N225CM, took off from Torrance (CA) Airport without a clearance to depart. Special Visual Flight Rules (SVFR) prevailed at the time due to a ceiling below 1000 feet and visibility less than 3 miles. Tr. at 22. The Administrator alleged that, while respondent had received a clearance to operate in SVFR conditions, he had not received the additional and necessary departure clearance when he took off.<sup>3</sup> It was respondent's contention that ATC at Torrance

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<sup>2</sup>Section 91.129(i), Operations in Class D airspace: Takeoff, landing, taxi clearance, provides:

No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from Air Traffic Control (ATC).

Section 91.157(b)(1), Special VFR weather minimums, reads:

Special VFR operations may only be conducted with an ATC clearance.

Section 91.13(a), Careless or reckless operation: Aircraft operations for the purpose of air navigation, provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>At the time, Torrance was experimenting with a procedure that allowed helicopter takeoffs and landings in so-called non-movement areas (e.g., areas other than runways and taxiways). Technically, takeoff and landing authorizations from non-movement areas are not "clearances," and pilots are not to be told they

confused the two phraseologies, using them interchangeably, and often joined together the two clearances, and, therefore, that it was reasonable for him to have believed that he had been authorized to take off.

The law judge concluded that respondent had taken off without a departure clearance, but found the sanction should be mitigated considerably because of the possibility for confusion and because no real danger was created by respondent's action.<sup>4</sup>

On appeal, respondent raises two essentially procedural issues: first, whether the law judge erred in refusing to continue the hearing to permit testimony from a witness scheduled for surgery on the day of the hearing; and second, whether the

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are "cleared for takeoff" from these areas. The Air Traffic Control Handbook, Paragraph 3-11-2 (Exhibit C-4), indicates that authorization to depart or land from such areas will instead be in the form of language to the effect that the pilot may "proceed as requested." Respondent was told by the tower controller:

helicopter five charlie mike cleared out of the torrance class d surface area via maintain special vfr conditions at or below two thousand five hundred it will be a right crosswind departure over hawthorne boulevard report reaching vfr or clear of class d surface area.

<sup>4</sup>The Administrator argued, in support of the 91.13(a) charge, that respondent had caused a loss of separation with a helicopter landing elsewhere at the airport at the time. This charge need not be separately proven, as it is derivative of the operating violations found. See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there. It is our understanding that loss of separation requires proof of aircraft operations closer than specified distances. Here, there was no evidence offered regarding the distances between the aircraft. Instead, the Administrator equated, improperly in our view, loss of separation with ATC's inability to see both aircraft. (It is ATC's obligation under SVFR not to have two aircraft in the same airspace unless and until both are visible.)

law judge erred in denying respondent's motion to dismiss. We address each argument in turn.

1. Unavailability of Mr. Robin Petgrave. Respondent argued at the hearing, and repeats on appeal, that Mr. Petgrave, as owner of the aircraft and the fixed base operator, would have testified to the confusion at the airport regarding departures and arrivals from non-movement areas, and that the clearance given respondent was standard there. On appeal, respondent adds that Mr. Petgrave contacted FAA Washington headquarters to discuss the problem.<sup>5</sup> The law judge found the offer of proof regarding Mr. Petgrave's testimony cumulative, but also relied on the fact, with which we entirely agree, that Mr. Petgrave's absence was not unexpected (he had had this surgery scheduled for some time) and a continuance could have been requested much earlier. Respondent offers no answer to this latter point, and his appeal on this issue may be denied on this alone.<sup>6</sup>

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<sup>5</sup>Attached to respondent's appeal brief is a statement from Mr. Petgrave which the Administrator moves to strike as new evidence. The motion is granted. There appears no reason why this offer of proof could not have been presented earlier.

<sup>6</sup>Mr. Petgrave's testimony by deposition could also have been agreed to by the parties. After our review of the record, we also agree with the law judge's conclusion that much of Mr. Petgrave's evidence would have been cumulative, nor can we find that denial of the continuance adversely affected the result. The law judge accepted, in great part, respondent's view of what appeared to be inconsistent procedures at the airport and, as a result, substantially reduced the sanction. Respondent offers no citation to support dismissal of the charges or removal of sanction in circumstances such as these. See Administrator v. Fox, NTSB Order EA-4076 (1994) (pilot is not excused when reasonable action would have exposed the error). Here, respondent testified to his belief that the phrasing of the "clearance" was "unique," that ground control usually gave SVFR

2. The motion to dismiss. Respondent contends that the law judge must have been wrong in denying his motion because, if the case-in-chief offered only a prima facie case, and not proof by a preponderance of the evidence, and if the rebuttal witnesses offered no additional proof of the charges, the Administrator cannot have prevailed by a preponderance of the evidence. This argument misstates the law judge's conclusions.

At the conclusion of the Administrator's case, respondent moved for dismissal, stating that the Administrator had not proved his case by a preponderance of the evidence. The law judge correctly responded that this was not the issue, but rather whether the Administrator had made a prima facie case. The law judge found that the Administrator had done so, and respondent does not here disagree. In making this finding, the law judge offered no opinion or conclusion whatsoever about whether the evidence also met the greater test of preponderance of the evidence, and he proceeded to hear respondent's case-in-chief and the Administrator's rebuttal witnesses. Regardless of the substance of the rebuttal testimony (and we disagree with respondent's one-sided categorization of it), it is entirely possible for the law judge to have concluded, after hearing all the evidence, that the complainant has prevailed by a

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clearances, with the tower giving departure authority, and that the language at issue had been used, in his recollection, by ground control not the tower. Tr. at 91. He also testified that part of his reason for taking off was his belief that the SVFR conditions might have been removed. Id. Respondent's obligation in the face of uncertainty was and is to seek clarification.

preponderance of the evidence.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 50-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.<sup>7</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>7</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to 14 C.F.R. 61.19(f).